taxation and the Bill of Costs No 64/1987 and declare the taxation proceedings void. Rodyk & Davidson raised the issue of estoppel based on the failure on the part of the applicants to attend the taxation on 20 January 1987. They relied on s 117 of the Evidence Act (Cap 97, 1985 Ed). I do not think estoppel applies in the circumstances of this case.

Order accordingly.

Solicitors: *Rodyk & Davidson*; *Tan Rajah & Cheah*; *Joseph Hoo Morris & Kumar.*

Reported by *PS Ranjan*

Re Great Eastern Hotel (Pte) Ltd

HIGH COURT (SINGAPORE) – COMPANIES WINDING-UP NO 578/85
GRIMBERG JC
8 OCTOBER 1988

Companies and Corporations – Winding up – Petition brought by member – Allegation of inability to pay debts – Allegation that directors acted in their own interests or in a manner unfair or unjust to other members – Just and equitable ground – Insolvency – Test for – Debts – Meaning of – Allegation of oppression by directors – Companies Act (Cap 185, 1970 Ed), ss 132D, 161, 216, 251 & 254

Statutory Interpretation – Debts – Distinction between debt founding a petition for winding up and debt provable in a winding up – Companies Act (Cap 185, 1970 Ed), s 254(1)(e)

In this case a winding-up petition was brought against Great Eastern Hotel (Pte) Ltd ('the Company') by one of its members on the grounds:

(a) that the Company was unable to pay its debts within the meaning of s 254(1)(e) of the Companies Act ('the Act');
(b) that the directors had conducted the affairs of the Company in their own interest rather than in the interest of the members as a whole, or in a manner which appeared to be unfair or unjust to other members within the meaning of s 254(1)(f) of the Act; and/or
(c) that it was just and equitable that the Company be wound up under s 251(1)(i) of the Act.

Alternatively, the petitioner sought a winding-up order, or an order for the purchase of his shares by the Company, under s 216(2)(d) and (f) respectively of the Act, on the grounds that the affairs of the Company were being conducted or the powers of the directors were being exercised in a manner oppressive to the petitioner.

Of the petitioner's various complaints, only three survived by the time the trial was concluded.

The first of the three complaints was that the Company made payments totalling $180,000 by way of commission but that the payments were not approved by a resolution of the directors and that the vouchers by which these payments were acknowledged were signed by unidentified persons. On behalf of the company, it was said that the sum was paid to a certain Jimmy Toh who represented 'a few persons' as consideration for the introduction of the Bank of China ('BOC') to the Company which introduction resulted in BOC giving a loan of $9 million to the Company.

The second allegation was that Mr Ang Kho Thang, who had been the managing director at all material times of the Company, had taken the sum of $30,000 from the Company without authorization or any supporting document.

The third complaint was that an allotment of a total of 1,200,000 shares in the Company to three allottees, namely, Ang Kho Thang & Sons Pte Ltd ('Angco'), Ong Teow Chuie & Sons Pte Ltd ('Ongco'), and to one Mr Hung Hiong Chong ('Hung'), were ultra vires art 45 of the articles of association of the Company. Angco, Ongco and Hung were in 1979 shareholders of a company called Oasis Holdings Pte Ltd ('Oasis'). Oasis had provided assistance to the company in obtaining financing from BOC and it was common ground that Oasis would be entitled to an allotment of 2,500,000 shares in the Company at par, equivalent to the moneys provided by Oasis to the Company for the purposes of capital repayments to BOC. As a result, a total of 637,000 shares were allotted to Oasis, which allotment was recognized by the parties as representing the first tranche of the 2,500,000 shares Oasis was to receive. It was also recognized by the parties that the allotment of 1,200,000 shares objected to in the petition represented the second tranche of the 2,500,000 shares to which Oasis was entitled. It was contended for the petitioner that the directors' resolution (by which it was resolved that the shares comprised in the second tranche be allotted to Angco, Ongco and Hung) was a departure from the mandate of the shareholders expressed at an extraordinary general meeting of the Company held on 22 April 1981 at which it was resolved, inter alia, that applications for the transfer by Oasis of shares allotted to it under its agreement with the Company should be made in writing to the board of the Company, and would be subject to board approval; and secondly, that the Company 'be not authorized to adopt s 132D of the Company's (sic) Act in relation to the allotment of shares'.

At the annual general meeting of the Company held on 7 October 1983, an ordinary resolution in the following terms was passed: 'That full authority be and is hereby given to the directors pursuant to s 132D of the Companies Act (Cap 185), to issue shares of the Company in such numbers and to such persons and for such consideration as they think fit; such authority to continue in force until the conclusion of the annual general meeting next after this date.'

In regard to the petitioner's contention that the Company was unable to pay its debts, it was contended on his behalf that the test for solvency in law is failed if a deficiency exists of current assets over current liabilities ('the quick assets test') and that a company can only be said to be solvent if it is able to pay its debts 'out of its own money'.

The court was asked in the event that the court was not prepared to make a winding-up order simpliciter, to consider as an alternative an order under s 216(2)(d) of the Act by which the winding-up order would not take effect for a period of, say, two weeks, the order to be permanently stayed or withdrawn if the petitioner's shares in the Company were purchased on or before the expiry of that period.

Held, dismissing the petition:

(1) The payments to Jimmy Toh of the commission amounting to $180,000, although not paid pursuant to a resolution of the directors were referred to subsequently at a general

meeting of the Company when all the acts of the directors prior to that date, including the payment of the 'fee' to Jimmy Toh, were ratified. Whatever may have been the character of the payments to Jimmy Toh, they were made in consideration of the BOC loan being procured for the benefit of the Company at a time when it was in extremis. Under cross-examination, the petitioner had accepted that, had the matter of the payment of the commission been put to a vote when he was present, he would have voted in favour. The decision to pay the commission did not amount to conduct on the part of the directors which was oppressive to the petitioner.

(2) On the evidence, Ang had not received the sum of $30,000, the subject matter of the second complaint, which eventually had been reduced to a very brief complaint about the way the sum was treated in the accounts. There was nothing in this complaint against the directors in general, and Ang in particular, and oppression was not made out.

(3) By virtue of art 45, the Company was entitled to give *any* direction with regard to the allotment of new shares. The article does not require the direction to be specific. The resolution passed at the annual general meeting on 7 October 1983 was directed to the issue of any shares in the company and included the issue of the second tranche of Oasis shares. The allotment of this tranche was dealt with by the directors barely a month later when they resolved that 1,200,000 shares would be allotted to Angco, Ongco and Hung.

(4) In any event, the point taken on behalf of the petitioner regarding the effect of art 45 was a technical one. It had at all times been common ground that the 1,200,000 shares allotted to Angco, Ongco and Hung were part of the Oasis entitlement to 2,500,000 shares, and accordingly satisfied that part of the Oasis entitlement. Angco, Ongco and Hung were shareholders of Oasis and by a letter Oasis requested, and by its endorsement the Company agreed, that the Oasis shares should go to Angco, Ongco and Hung in the proportions stated in that letter. The directors' resolution of 8 November 1983 gave effect to the Oasis requirement in so far as the allotment of the 1,200,000 shares was concerned.

(5) The point taken on behalf of the petitioner regarding the effect of art 45 of the Company's articles of association was a technical one. If there was a technical breach of art 45, it did not amount to oppressive conduct on the part of the directors. The 8 November 1983 resolution was not passed in order to obtain an inequality of shareholdings, as alleged on behalf of the petitioner.

(6) The allotment of the 1,200,000 shares to Angco, Ongco and Hung was not 'burdensome, harsh or wrongful', nor did it amount to a selfish or unfair dealing on the part of the directors. The high standard of turpitude that is required to establish oppression for the purposes of s 216(1)(a) of the Companies Act was not made out.

(7) The court could not accept that the test for solvency in law is failed if a deficiency exists of current assets over liabilities ('the quick assets test') and that a company can only be said to be solvent if it is able to pay its debts 'out of its own money'. There are two tests, the one practical and the other theoretical, which are the true tests for insolvency. The practical test is whether the company has failed to meet a current demand for a debt already due. The theoretical test is whether, on a balancing overall of liabilities against assets, there is a deficit. In the instant case, the company passes both tests, and there is no basis in law for saying that it is insolvent because it would not be in a position to pay its debts out of current assets if its bankers were to call in the overdraft. The reality was that the bankers had not demanded payment, and the debt was not due. The company cannot be said to be insolvent, and accordingly the court declined to make a winding-up order on that ground.

(8) It is clear too that the word 'debts' in what were referred to as the 'non-winding up sections' has a wider meaning than in the winding-up sections. A clear distinction exists between a debt which is capable of founding a petition and the wider category of debts which are provable in winding up.

(9) The only basis upon which it was suggested that it was just and equitable that the company be wound up was that the company 'will not be able to pay its debt'. The court was not prepared to make a winding-up order on that ground either, having concluded that the company was not insolvent.

(10) An order under s 216(2)(d) of the Act could not be made because the court was empowered to make such an order only if it was of the opinion that a case of oppression under s 216(1)(c) of the Act was made out. The court was not of such opinion, however.

[*Editorial Note*: The petitioner has appealed to the Court of Appeal vide Civil Appeal No 107 of 1988.]

Cases referred to

1 *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 (folld)
2 *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1976] 1 MLJ 59 (refd)
3 *Re Capital Annuities Ltd* [1979] 1 WLR 170 (folld)
4 *Sandell* v *Porter & Anor* (1965) 115 CLR 666 (distd)
5 *Re Timbatec Pty Ltd & Companies Act* 4 ALR 12 (distd)
6 *Expo International Pty Ltd etc* v *Chant & Ors* [1979] 2 NSWLR 820 (distd)
7 *Bank of Australasia* v *Thomas Murray Hall* (1907) 4 CLR 1514 (folld)
8 *Hymix Concrete Pty Ltd* v *Garritty* (1977) 13 ALR 321 (refd)

Legislation referred to

Companies Act (Cap 50, 1985 Ed) ss 161, 216, 251, 254
Companies Act (Cap 185, 1970 Ed) s 132D
Bankruptcy Act 1924-1960 [Aust] s 95
Companies Act 1965 [Mal] s 181(1)(a)
Companies Act [Aust] s 294
Companies Act 1948 [UK] ss 223(d), 223, 518(1)

C Darvall, QC (*Joseph Ang* with him) for the petitioner.
MF Lyndon-Stanford, QC (*Chandra Mohan* with him) for the company.

Cur Adv Vult

Grimberg JC: This was a petition for the winding up of Great Eastern Hotel (Pte) Ltd ('the Company'). At the conclusion of the trial, which lasted some five weeks, I dismissed the petition with costs.

These are my reasons for having done so. To the extent that the following consists of a narrative of the events leading to the presentation of the petition, and a description of the two main personalities involved, it comprises agreed facts, or where not agreed, my findings as to those facts.

The Company was incorporated in 1969, with the principal object of carrying on the business of a hotel owner and operator. It acquired land, now known as 401 MacPherson Road, and it commenced in 1972, and completed in 1980, the construction upon this land of the Great Eastern Hotel ('the hotel'), comprising a four-storey podium and a tower block which accommodates most of the hotel's 151 guest rooms. The authorized capital of the Company is $10 million, divided into 10 million shares of $1 each, of which 7,858,040 have been issued.

Mr Yang Chen Ching ('the petitioner') is a Japanese national of Chinese origin. He spends most of his time in Japan, and is now about 72 years old. He has, or has had, substantial business interests in Japan and elsewhere. In 1978, or thereabouts, the petitioner was associated in business in Malaysia with a man called Lau Hui Kang ('Lau'). He was also friendly with Teong Eng Siong ('Teong'). Lau and Teong were, directly or indirectly, shareholders of the Company. In mid-1978 the petitioner began acquiring shares in the company by allotment upon the recommendation of Teong. By January 1979 he was the owner of 300,000 shares in the Company, and was appointed a director.

The managing director of the Company is Mr Ang Kho Thang ('Ang'). He has held that office at all material times. Ang is, and always has been, the driving force behind the Company. He was born in China, does not speak or read English, and has no accounting experience. He is now aged about 60, and is not in the best of health. Ang's family company, which he directs and controls, but in which he has no direct shareholding, is called Ang Kho Thang & Sons Pte Ltd ('Angco'). It owns approximately 53% of the issued share capital of the Company.

The second largest shareholder of the Company is Ong Teow Chuie & Sons Pte Ltd ('Ongco'), a company controlled by Mr Ong Teow Chuie ('Ong'). Ongco owns approximately 13.5% of the Company's issued capital, and Ong has at all material times been a director.

Angco, Ongco and a Mr Hung Hiong Chong ('Hung') were in 1979 shareholders of a company called Oasis Holdings Pte Ltd ('Oasis'), which owns premises at 50 Kallang Park, upon which a restaurant and night-club business is carried on.

In 1978, the Company's banker was the Moscow Narodny Bank ('MNB'). By about mid-1978 MNB regarded the Company, which was clearly undercapitalized, as an unsatisfactory customer. In December 1978 MNB requested all shareholders to pledge their shares as security for outstanding loans, and at a meeting of the Company's directors, held on 12 January 1979, it was resolved that the overdraft extended by MNB should be additionally secured by the provision of personal guarantees of the directors. The petitioner did not pledge his shares to MNB in accordance with its request in December 1978, and he failed to furnish a personal guarantee to the bank in accordance with the resolution of the directors passed on 12 January 1979, although the petitioner had by then been appointed to the board.

By letter dated 22 January 1979, MNB proposed a repayment schedule which included repayment by the Company of at least $300,000 by 31 March 1979, and of between $2 million and $3 million by 30 June 1979, stipulations which the Company was clearly not capable of meeting unless fresh capital could be raised (as to which there was no possibility), or a new banker could be found. The quest for a new banker had, in fact, begun at least as early as January 1979. The petitioner was fully aware of the Company's plight, and participated, unsuccessfully, in the search for a new banker. There is evidence that a syndicated loan was in contemplation later in 1979, but when it had not been secured by 18 July 1979, MNB wrote that unless a satisfactory explanation for the failure of the syndicated loan to materialize was received within seven days, MNB might 'have to resort to some unpleasant course of actions'. The Company had reason to take this threat seriously – MNB had recently caused a receiver of the Cockpit Hotel to be appointed.

In the event, the day was saved by the Bank of China ('BOC'). By a letter dated 20 July 1979, it offered a loan of $6½ million dollars, which the Company's directors approved by resolution passed on 22 July 1979. The bank's security was to be a legal mortgage over 401 MacPherson Road, that is to say the hotel, the personal guarantees of the directors, and a floating charge over the Company's undertaking.

In August 1979 BOC agreed to increase the facility by a further $2.5 million dollars, the original and increased sums, amounting to $9 million, to be secured by mortgages over the hotel and over the Oasis property at 50, Kallang Park, the personal guarantees of the directors of the Company and of Oasis, and a floating charge over the undertaking of Oasis.

The new arrangements with BOC were in place by November 1979. On 27 November 1979 MNB was paid off in full, and BOC became the main banker to the Company.

The participation of Oasis in the Company's financing arrangements with BOC was made possible by an agreement between the Company and Oasis ('the Oasis agreement') which was never wholly reduced to writing. However, it was common ground that the main terms of the Oasis agreement were that the Company and Oasis would mortgage their respective properties to BOC; that all the Oasis directors would provide personal guarantees to BOC; that Oasis would provide the Company with

$37,500 a month towards the capital repayments the Company was obliged to make to BOC, totalling $2.5 million; and that Oasis would be entitled to an allotment of shares in the Company at par, equivalent to the moneys provided by Oasis to the Company for the purposes of capital repayments. On 20 August 1979 the board of the Company sanctioned the Oasis agreement, and it was approved by the Company in general meeting on 31 August 1979. The petitioner was not present at either of these meetings, but Teong was in attendance at the first of them, and both Teong and Lau were present at the second. Although the petitioner had been aware of the desperate financial straits in which the Company found itself in the first half of 1979, and must have known that the Company had been saved by BOC, since the petitioner was in Singapore again in September 1979, the petitioner did not become aware of the terms of the Oasis agreement at that time.

The petitioner paid one of his periodical visits to Singapore in March 1981, and attended a directors' meeting on the 25th of that month. The meeting was presided over by his friend Teong (who had by then become the chairman of the Company) and the petitioner's business associate, Lau, was also in attendance. Lau proposed an allotment of 600,000 shares in the Company in consideration of Oasis having provided a sum of $37,500 per month to the Company for repayment of the BOC loan, for the period December 1979 to March 1981, the 600,000 shares to be allotted as follows:

(a) Angco ... 360,000 shares
(b) Ong ..... 228,000 shares
(c) Hung .... 12,000 shares

It will be remembered that the proposed allottees were shareholders of Oasis.

Lau also proposed that a further 2.5 million shares be allotted to members of the Company, other than the three shareholders of Oasis, in proportion to their existing shareholdings on the same basis as the allotment to the three Oasis shareholders, payment for the shares so allotted to be made over a period of five years.

The petitioner contributed to the discussion. He did not object to the proposed allotments to Angco, Ongco and Hung, and he supported Lau's last proposal for the allotment of 2.5 million shares to the other shareholders, but suggested that payment should not be spread over five years. In the event, no formal resolutions were passed. The petitioner became aware of the terms of the Oasis agreement prior to the 25 March 1981 board meeting. On 22 April 1981 an EGM of the Company was held. It was chaired by Teong, and Lau was present as was the petitioner. The proposed allotment of 600,000 shares was raised, and Lau formally referred to the Oasis agreement, which had been concluded on 20 August 1979. He proposed that 2.5 million shares be allotted to Oasis, and not to individual shareholders of that Company, at par, over a period of five years, in consideration of the monthly sums of $37,500 which Oasis had provided, and was to continue providing, to the Company for the purposes of the capital repayments due to BOC.

In the event, it was resolved that 637,500 shares of $1 each be allotted to Oasis in consideration of the moneys already provided by Oasis to the Company for the period December 1979 to April 1981 at $37,500 a month.

The meeting passed two further resolutions. Firstly, it was resolved that applications for the transfer by Oasis of shares allotted to it under the Oasis agreement should be made in writing to the board of the Company, and would be subject to board approval; and secondly, the meeting resolved that the Company 'be not authorized to adopt s 132D of the Company's (sic) Act in relation to the allotment of shares'.

The fortunes of the Company took a turn for the better after the BOC loan was obtained. Having turned in a loss of about $111,000 for 1979, it made a profit of approximately $109,000 in 1980. From having distanced himself from the Company when a pledge of his shares, and his personal guarantee in favour of MNB, were sought in 1978 and 1979, the petitioner began, following the board and general meetings of the Company held in March and April 1981, to take an active interest in what was going on. He attended an EGM on 18 June 1981 and tendered to the meeting a memorandum in Chinese, with an English translation, asking that its contents be placed on record. In this document the petitioner expressed dissatisfaction over not having been told of the Oasis agreement, which he described as an 'unequal deal' concluded 'without the authorization of the shareholders', by which Oasis was to be allotted 2.5 million shares in the Company as a 'reward' for furnishing security for the BOC loan, and providing the Company with funds for the purposes of the capital repayments due to the bank. The petitioner concluded his memorandum by calling upon Ang to make available to him up to date audited accounts, and a statement of the assets and liabilities of the Company.

The petitioner's complaint coincided exactly with the acquisition by him of a further 410,000 shares in the Company from another shareholder, Choo Siok Chun. This brought the petitioner's shareholding up to 741,500 shares, equivalent to a 9.44% interest in the Company's share capital, which was the extent of the petitioner's shareholding when this petition was filed.

The petitioner's request, by way of his memorandum, for information concerning the Company's financial affairs was not met.

The Company's accounts for the year ended 31 December 1979 were not approved and adopted until July 1982, and those for the year ended 31 December 1980 were not approved and adopted until November 1982. The petitioner consulted solicitors, and on 13 May 1983 they wrote to Ang informing him that the petitioner had appointed the then local associates of Touche Ross & Co to inspect the accounting records of the hotel. Although on the face of it consenting to make these records available to the accountants for inspection, it is evident that the Company was uncooperative.

The Company's 1981 accounts were approved and adopted at an AGM held on 23 May 1983. By Originating Summons No 470 of 1983 issued on 22 June 1983, the petitioner sought an order that the accounting and other records of the Company be open to inspection by the petitioner's accountants. The application was resisted by the Company initially but, in the event, a consent order in the terms sought by the petitioner was made on 12 September 1983.

The Touche Ross partner under whose supervision the inspection of the Company's accounting records was to be carried out was Mr Mick Aw Cheok Huat. Although his firm was instructed to proceed with the inspection on the day the consent order was made, neither the Company's director in charge of the accounting records, Mr David Tian, nor its auditors, were cooperative. Mr Aw's report to the petitioner's solicitors, dated 15 November 1983, discloses that inspection of the Company's records commenced on 26 September 1983. The inspection proceeded, according to Mr Aw in evidence, 'on and off' for about two weeks. The petitioner ceased to be a director of the Company on 7 October 1983, upon which date the order requiring the Company to open its records for inspection by the petitioner's accountants ceased to have effect.

In the time available to them, members of Mr Aw's staff were only able to carry out a limited inspection of the Company's accounting records for the year ended 31 December 1979. Their inspection revolved around the Company's general ledger, and payment vouchers, for that year. In consequence of this inspection the Company was asked for explanations concerning a number of matters, and correspondence took place between the petitioner's solicitors and the then solicitors for the Company between November 1983 and June 1984. The petitioner's advisers regarded the Company's explanations as being unsatisfactory, and threatened winding-up proceedings in the event that further information was not provided. In the event, this petition was filed on 7 November 1983. Solicitors acting for Angco and nine other shareholders, owning in aggregate 87% of the issued share capital of the Company, sought a postponement of the advertisement of the petition. They offered their shares to the petitioner at a price of $2.85 per share, while indicating their lack of interest in purchasing the petitioner's shareholding. This eleventh hour effort to resolve matters failed, the petition was duly advertised and it proceeded to trial.

By the conclusion of the trial, the petitioner's somewhat imprecise allegations, and claims for relief, had resolved themselves and it was made clear by Mr Darvall, counsel for the petitioner, that what the petitioner sought was a winding-up order on the grounds:

(i) that the Company is unable to pay its debts (s 254(1)(e));

(ii) that the directors had acted in the affairs of the Company in their own interests rather than in the interests of the members as a whole, or in a manner which appeared to be unfair or unjust to other members (s 254(1)(f)); and/or

(iii) that it was just and equitable that the Company be wound up (s 251(1)(i)).

Alternatively, the petitioner sought a winding-up order, or an order for the purchase of his shares by the Company, under s 216(2)(d) and (f) respectively, on the grounds that the affairs of the Company were being conducted, or the powers of the directors were being exercised in a manner oppressive to the petitioner.

The petitioner complained of several matters which he claimed amounted to oppressive conduct on the part of the directors. The Company's failure to cooperate in regard to the inspection of its accounting records was not a matter complained of. As the trial progressed the majority of the petitioner's complaints fell away, to the extent that by its conclusion, only three complaints survived. I will deal with them separately.

1 *Payments made by the Company, totalling $180,000, between July and December 1979*

The petitioner complained in the petition that these payments were shown in the Company's financial records as having been paid by way of commission, but that the payments were not approved by a resolution of the directors and that the vouchers by which the payments were acknowledged were signed by unidentified persons. On behalf of the Company, it was said that the $180,000 was paid to a certain Jimmy Toh, 'who represented a few persons', as a consideration for the introduction of BOC to the Company in or about 1979, which introduction resulted in the conclusion of the $9 million BOC loan. The $180,000, it was said by the Company, represented a commission of 2% on the amount of the loan, and evidence was given on behalf of the Company which established that partial payments of the $180,000 commenced on 26 July 1979, four days after the directors approved the $6.5 million facility offered by BOC, and concluded by a payment of $7,500 on 26 December 1979, approximately a month after the BOC loan was drawn down.

Neither Jimmy Toh, nor any of the signatories of the vouchers, gave evidence for the Company, and I was asked to draw an adverse inference from their absence. However, all the vouchers referred to 'payment to (or of) account of com', and the payments were entered as commission in the Company's books. Ang, Mr Wong Yii Chung, at the material time a director and now deputy managing director of the Company, and Miss Susan Tan Soh Keow, an accounts clerk, gave evidence for the Company in support of the payments having been made as commission.

Ang's evidence in this respect was unimpressive. His memory of the events surrounding the offer of the BOC loan was often vague, and frequently deserted him altogether. All that he could say was that Jimmy Toh paid him two unsolicited visits in July 1979, when the Company was in deep trouble with MNB, and offered to procure a loan from BOC, saying that he 'knew someone in BOC'. Ang did not know how many persons Toh represented, but a group of persons some or all of whom he also met, succeeded in arranging the BOC loan. Toh assisted Ang in completing a written application for the loan, and it was reasonable to infer, and I did so, that this application contained most of the information BOC would have required in order to arrive at its assessment as to whether the loan should be made. After the loan was approved, Ang gave instructions to Susan Tan for cheques to be drawn to cash and handed to persons who came to collect them on Jimmy Toh's behalf.

Wong Yii Chung and Susan Tan were a lot more convincing in evidence. They supported Ang's evidence, and Wong said that the 2% commission which was agreed with Jimmy Toh was substantially lower than the rate of commission which was being asked by other intermediaries.

In the result, I accepted the evidence of the Company's witnesses in regard to the payments amounting to $180,000. Ang was asked in cross-examination, although this was not asserted in the petition, whether he had pocketed any part of the money. He denied having done so, and I believed him. I put down Ang's unconvincing display in the witness box regarding Jimmy Toh and the $180,000, to the fact that there was possibly some impropriety in the making, and/or receipt of, the payments. A somewhat similar situation arose in *Re Kong Thai Sawmill (Miri) Sdn Bhd*,[1] with reference to political donations made out of that company's funds by Ling Beng Siew, its managing director. Ling's difficulty in being forthright about these donations was recognized by Lord Wilberforce in these terms, at p 231:

> The learned judge cannot have failed to appreciate the difficulty in which Beng Siew would find himself, in some cases, if he were pressed to give names of some recipients – indeed that he did so is clear from a passage at the close of his judgment.

Having regard to the circumstances in which the payments amounting to $180,000 were made, and while not condoning them if they were improper, I do not find it in the least surprising that the signatures on the payment vouchers were neither identified, nor identifiable. It is also not surprising, for the same reason, that no resolution was passed in 1979 with regard to these payments. The payments of commission were, however, referred to at a general meeting of the Company held on 20 January 1984, when all the acts of the directors prior to that date, including the payment of the 'fee' to Jimmy Toh, were ratified. In the *Kong Thai* case[2] retrospective ratification was (on the facts of that case) regarded as acceptable – see pp 231-232.

Whatever may have been the character of the payments of $180,000 to Jimmy Toh, I found that they were made in consideration of the BOC loan being procured for the benefit of the Company, at a time when it was in extremis. Under cross-examination, the petitioner accepted that, had the matter of the payment of the commission been put to a vote when he was present, he would have voted in favour. In my judgment, the decision to pay the commission did not amount to conduct on the part of the directors which was oppressive to the petitioner.

2 An alleged unsupported payment by the Company of $30,000 to Ang

The petition alleged that a 'sum of $30,000 was taken by Mr Ang Kho Thang ... without authorization or any supporting document'. By the time counsel for the petitioner came to make his closing submission, this allegation had been reduced to a very brief complaint about the way the $30,000 had been treated in the accounts. No longer, it seemed, was it alleged that Ang had received this money, and indeed I found, on the evidence, that he had not. The cheque for the $30,000 in question, dated 26 July 1979, was made out to Oasis, and it was cancelled without ever having been paid.

There was nothing in this second allegation against the directors in general, and Ang in particular, and oppression was not made out.

3 An allotment of 1.2 million shares in the Company

By a resolution of the directors passed on 8 November 1983, 1.2 million shares in the Company were allotted as follows:

(a) Angco	720,000	shares
(b) Ongco	456,000	shares
(c) Hung	24,000	shares
	1,200,000	shares

The petition alleged that this allotment was ultra vires art 45 of the Company's articles of association. Article 45 is in the following terms:

> Subject to any direction to the contrary that may be given by the company in general meeting, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and, after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of those shares in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this regulation.

I have already referred to the circumstances which gave rise to the BOC loan, the part played by Oasis in the securing of the loan, and the terms of the Oasis agreement.

I have also made reference to the resolution at the EGM of the Company held on 22 April 1981, which the petitioner attended, by which it was resolved that 637,000 shares of the Company be allotted to Oasis. It will be recalled that this meeting resolved that the shares so allotted should be issued to Oasis and not individual shareholders of the Company; and that the Company was not 'to adopt' s 132D of the Companies Act (Cap 185, 1970 Ed) (now s 161(1) of the Companies Act (Cap 50, 1985 Ed) 'in relation to the allotment of shares'.

Section 132D was, and s 161(1) is, in the following terms:

> Notwithstanding anything in a company's memorandum or articles, the directors shall not, without the prior approval of the company in general meeting, exercise any power of the company to issue shares.

At the 11th AGM of the Company held on 7 October 1983, that is to say approximately four weeks before the directors resolved to allot a total of 1.2 million shares to Angco, Ongco and Hung, the following standard resolution was passed as an ordinary resolution:

> That full authority be and is hereby given to the directors pursuant to s 132D of the Companies Act (Cap 185), to issue shares of the Company in such numbers and to such persons and for such consideration as they think fit; such authority to continue in force until the conclusion of the annual general meeting next after this date.

No objection was taken in the petition to the allotment of the 637,000 shares to Oasis pursuant to the 22 April 1981 resolution, and it was recognized by the parties that (a) these 637,000 shares represented the first tranche of the 2.5 million shares Oasis was to receive; and (b) that the 1.2 million allotment objected to in the petition represented the second tranche of the 2.5 million shares to which Oasis was entitled.

It was contended, on behalf of the petitioner that, in the light of the resolutions passed at the EGM held on 22 April 1981, the resolution of the directors of 8 November 1983 by which it was resolved that the second tranche of 1.2 million shares should go to Angco, Ongco and Hung in the numbers to which I have referred, was a departure from the mandate of the shareholders expressed at the EGM on 22 April 1981. It was said that the resolution of 8 November 1983 was not a 'direction to the contrary' within the meaning of art 45 of the Company's articles, since it did not amount to a specific direction for a part of the shares to which Oasis was entitled to be allotted instead to Angco, Ongco and Hung. To hold otherwise, it was argued, would have the effect of allowing the Company to amend art 45 without passing a special resolution. The majority shareholders had accordingly acted oppressively against the minorities by the use of their shareholdings and votes to pass the resolutions in question at the 11th AGM, and the board meeting of 8 November 1983, in order to cause the allotment of part of Oasis' 2.5 million shares entitlement to go to Angco, Ongco and Hung.

Even if the s 132D resolution passed at the 11th AGM *was* a 'direction to the contrary' as envisaged by art 45, I was urged on behalf of the petitioner to hold that the resolution was passed by the majority shareholders oppressively, in order that an inequality of shareholdings would result.

That, it was contended, was oppression within the meaning of s 216(1) of the Act.

I was unable to accept these arguments. By virtue of art 45, the Company was entitled to give *any* direction with regard to the allotment of new shares. The article does not require the direction to be specific. The resolution passed at the 11th AGM on 7 October 1983 was directed to the issue of any shares in the Company and included, in my judgment, the issue of the second tranche of Oasis shares. The allotment of this tranche was dealt with by the directors barely a month later, at their meeting held on 8 November 1983, when they resolved that the 1.2 million shares would be allotted to Angco, Ongco and Hung.

If I am wrong concerning the effect of art 45 then I hold that the point taken on behalf of the petitioner is a technical one. It has at all times been common ground that the 1.2 million shares allotted to Angco, Ongco and Hung were part of the Oasis entitlement to 2.5 million shares, and accordingly satisfied that part of the Oasis entitlement. Angco, Ongco and Hung were shareholders of Oasis, and by letter dated 24 April 1981 (a copy of which is exh AB1 to the affidavit of Tian Tow Choo filed on 27 March 1986), Oasis requested, and by its endorsement the Company agreed, that the Oasis shares should go to Angco, Ongco and Hung in the proportions stated in that letter. The 8 November 1983 resolution gave

effect to Oasis' requirement in so far as the 1.2 million allotment was concerned.

If there was a technical breach of art 45 of the Company's articles, it did not amount to oppressive conduct on the part of the directors. The board resolution of 8 November 1983 gave effect to the Company's agreement to Angco, Ongco and Hung succeeding to Oasis' rights in the 1.2 million share tranche. In my judgment the 8 November 1983 resolution was not passed in order to obtain an inequality of shareholdings, as alleged on behalf of the petitioner.

In the *Kong Thai* case[2] in the Federal Court, Gill CJ stated, at p 62:

> It is to be observed that the jurisdiction of the court under s 181(1)(a) of the Act arises if it is shown that the powers of the directors are being exercised in a manner oppressive to one or more of the members or in disregard of their interests. The word 'oppressive' was defined in *Re RH Harmer Ltd* [1958] 3 All ER 689 to mean 'burdensome, harsh and wrongful'. In *Scottish Cooperative Wholesale Society Ltd* v *Meyer & Anor* [1958] 3 All ER 66 Lord Keith of Avonholm said:
>
> 'Oppression under s 210 may take various forms. It suggests, to my mind, as I said in *Elder* v *Elder & Watson* 1952 SC 49, a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members. The section introduces a wide power to the court to deal with such a situation in an equitable manner which it did not have in the case of a company prior to the passing of the Act of 1948. The court has here acted, in my opinion, within the powers conferred on it. Section 181 of our Companies Act is derived from but is wider in scope than s 210 of the English Act 1948 and s 186 of the Australian Act.'

Section 216(1)(a) of the Singapore Companies Act is in pari materia with s 181(1)(a) of the Malaysian Act.

In the course of his speech in the Privy Council in *Kong Thai*,[1] Lord Wilberforce said, at p 229:

> As was said in a decision upon the United Kingdom section, there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder* v *Elder & Watson* 1952 SC 49): their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson* v *Drysdale* 1925 SC 311).

When, on 22 April 1981, it was resolved that the first tranche of 637,000 shares in the Company should go to Oasis, and not to its individual shareholders, it was clearly contemplated that application might be made for future allotments arising under the Oasis agreement to go to other persons. In the event, that is what the 8 November 1983 resolution sought to accomplish, the Company having agreed that Angco, Ongco and Hung were to succeed to the rights of Oasis. The 8 November 1983 resolution was not 'an effort to obtain an inequality'. It was directed to the allotment of the second tranche of a total of 2.5 million shares to which Oasis was primarily entitled under the Oasis agreement, an agreement that had been approved by the shareholders in general meeting as far back as 31 August 1979.

The allotment of the 1.2 million shares to Angco, Ongco and Hung was not 'burdensome, harsh or wrongful', nor did it amount to a selfish or unfair dealing on the part of the directors. The high standard of turpitude that is required to establish oppression for the purposes of s 216(1)(a) of the Companies Act was not made out.

I turn now to the contention made on behalf of the petitioner at the trial that the Company is unable to pay its debts and/or that I should conclude that it is just and equitable that the Company be wound up. I say 'at the trial' advisedly because in the petition there is no allegation that the Company is unable to pay its present debt, but that it 'will not be able to pay its debt'. At the date of the petition the petitioner was talking about a prospective inability to pay debts, on the basis of which it was just and equitable that the Company be wound up.

Section 254(2)(c) provides that a company shall be deemed to be unable to pay its debts if that is proved to the court's satisfaction; and in determining whether a company is unable to pay its debts the court must take into account the contingent and prospective liabilities of the company.

A convenient point at which to commence an examination of the Company's financial position is the year 1984. In that year, the term loan facility granted by BOC in November 1979 was replaced by an overdraft from the Overseas-Chinese Banking Corporation ('OCBC') of $7 million.

In 1985, a bad year for the hotel industry, the Company decided to convert the fourth floor of the hotel into a health club, for which purpose OCBC granted an additional overdraft facility of $1 million.

In addition to maintaining its overdraft at OCBC the Company has two accounts at the Standard Chartered Bank ('Stanchart') which has a branch at the Company's premises at 401 MacPherson Road. One of the accounts at Stanchart is used for making payments in, and cheques are also drawn on this account. The other Stanchart account is used for the payment in of foreign currency received from hotel guests. From time to time amounts in credit in the Stanchart accounts are used to reduce the OCBC overdraft account, which is otherwise reduced by the hotel's takings.

Mr Teo Jin Han, a vice-president of OCBC, swore an affidavit in the proceedings by which he stated that

the overdraft account had been maintained by the Company in a manner which satisfied OCBC. The bank had agreed, in August 1985, to grant the Company the additional facility of $1 million, in consideration of a further charge on its security. As a consequence of the presentation of the petition in September 1985 the Company's account had been 'frozen' until, by order dated 16 December 1985, the court sanctioned its continued operation.

Mr Teo stated that, as of 1 September 1988, the Company's overdraft with OCBC stood at $6,687,450. During the first 20 days of September 1988 the account was credited with a sum of $38,000, reducing the overdraft to $6,619,468.63. As of 23 September 1988, that is to say a week before I dismissed the petition, the overdraft stood at $6,706,423.75, cheques drawn on OCBC by the Company having been presented for payment and cleared.

There was evidence before me that substantially all the Company's trade debts up to and including 31 August 1988, amounting to $160,000, had been paid off. As of 22 September 1988 trade debts amounted to a relatively insignificant sum of about $13,000, and there was no evidence of any unsatisfied demand for payment having been made.

There is now set out the capital, profit/loss, accumulated loss and current assets deficiency of the Company from year to year since 1984, and by 'current assets deficiency' is meant the deficiency in working capital over paid-up capital:

Year	*Paid Capital*	*Capital Reserve*	*Loss (Profit)*	*Accumulated Loss*
1984	$7,858,040	$400,507	$ 387,200	$1,784,600
1985	$7,858,040	$400,507	$1,442,921	$3,227,521
1986	$7,858,040	$400,507	$ 363,988	$3,590,509
1987	$7,858,040	$400,507	$ 24,175	$3,614,684

Year	*Pre-operational Expenses*	*Current Assets Deficiency*	*Share Application Moneys*
1984	$1,253,409	$6,874,978	$378,050
1985	$1,175,071	$8,399,741	$616,805
1986	$1,096,733	$8,219,374	$641,000
1987	$1,018,395	$7,688,751	$641,000

It will be seen that, as of 31 December 1987, there was a current assets deficiency of $7,688,751 and an accumulated loss of $3,614,684. The Company has not made a profit since 1984 – indeed, it has only managed to turn in a profit in two years since the hotel became operational in 1979, and has never paid a dividend. However, whereas a loss of almost $1.5 million was incurred in 1985, this was reduced to approximately $364,000 in 1986 and about $24,000 in 1987.

Mr Darvall submitted that, upon the application of a well-established test, and in the light of the provisions of s 254(2)(c) of the Act, the Company is clearly insolvent. Taking the OCBC overdraft into account, said counsel, the only way the Company can pay its debts is by realizing its only asset, the hotel, valued in March 1988 at about $21 million. The Company is being capitalized by overdraft, and suffers from a chronic lack of liquidity. The fact that, on balance sheet figures, the Company's assets exceed its liabilities does not mean that the Company is solvent. The acid test, it was contended, is that there should not be a deficiency on current assets, and the Company fails to pass that test.

Mr Darvall argued that the figure $641,000 found in the last column of the table, must be added to the current assets deficiency. This figure represents share application moneys in respect of which shares have not been issued, and the $641,000 must therefore be correctly treated as a liability. So treated, and added to the current assets deficiency as of 31 December 1987, a current deficiency of approximately $8.8 million is thrown up, against a paid-up capital of about $7.8 million. This means that if the Company's debts are called up the hotel must be sold. The wolf could only be kept from the door, counsel said, if an alternative lender were available, and the Company cannot be said to be solvent if it is only able to meet demands upon it by its creditors, including OCBC, by borrowing from another bank. Mr Darvall argued that it must, in order to be solvent, be able to pay its debts out of its own money.

I was unable to accept that the test for solvency, in law, is failed if a deficiency exists of current assets over current liabilities ('the quick assets test'), and that a company can only be said to be solvent if it is able to pay its debts 'out of its own money'. I was able to reach this conclusion at the end of the trial, as a consequence of a thorough analysis of the textbooks and case law by Mr Lyndon-Stanford, counsel for the Company, to whom I was much indebted.

Fitzgerald's Analysis and Interpretation of Financial and Operating Statements (2nd Ed), published admittedly in 1956, speaks at pp 67, 68 and 70 of the quick assets test, not as a test for insolvency, but as 'a measure of the capacity of a business to meet its current liabilities immediately or at short notice ...'. It is 'an extreme test of the capacity of a business to meet a financial crisis', or 'an indicator of trend in financial stability'.

Mr Darvall relied, inter alia, upon a passage at para (c) on p 859 of *Pennington's Company Law* (5th Ed), which deals with the deeming provisions in s 518(1) of the English Companies Act of 1985. Section 518(1)(e) of the English Act is identical to s 254(2)(c) of the Singapore Act. A close examination of the whole of the para-

graph relied on by Mr Darvall does not indicate the quick assets test as a test for insolvency under s 254(2)(c).

The learned editor speaks of two tests under the equivalent English subsection. The first test is failed when there are unsatisfied demands for debts already due, and the company is unable to pay those debts out of its liquid resources immediately available. Under the second test, the question must be asked what the sum is of all the liabilities of the Company, present and future, and what all its assets are worth. If the answer produces a deficit, the Company is insolvent. The second test does not speak of current assets, but of all assets.

It follows that the Company does not fail the first of the two tests, because there has been no demand for debts already due which the Company is unable to meet. Indeed, the Company has demonstrated its ability to pay its trade debts by settling those due as at 31 August 1988. Nor is the second test failed, because the value of the Company's assets far exceed the sum of its liabilities. It would be capable, if necessary, of paying all its debts including the overdraft, if called, by a realization of its assets, including the hotel, and of carrying on some other business, if its shareholders so wished, out of the net amount realized after payment of all liabilities.

Buckley on the Companies Acts (13th Ed), in dealing with s 223(d) of the English Act of 1948 (equivalent to s 254(2)(c) of our Act), states at p 460:

> The particular indications of insolvency mentioned in paras (a), (b) and (c) are all instances of commercial insolvency, that is of the company being unable to meet current demands upon it. In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it has no assets available to meet its current liabilities it is commercially insolvent and may be wound up.
>
> Paragraph (d), however, now recognizes and, in conjunction with s 222(e), expressly authorizes a winding up in the case of another kind of insolvency; that is to say, if the existing and probable assets will be insufficient to meet the liabilities, taking into account not only liabilities presently due but also those which are contingent and prospective.

The first quoted paragraph speaks of 'inability to meet current demands upon it', and the second paragraph of assets, present and future, being insufficient to meet liabilities, present and contingent – a restatement, it would seem, of Pennington's first and second tests for insolvency.

That in order for a company to fail the first test there should be a proper and unsatisfied demand appears from *Re Capital Annuities Ltd.*[3] There the question arose as to whether an insurance company was unable to pay its debts within the meaning of ss 222 and 223 of the Companies Act 1948. Slade J (as he then was) stated at pp 187-188:

> I think that Mr Oliver's submissions in this context really amounted to this. The most recent figures adduced by Mr Clemetson indicate that the amount of the cash presently in his hands is £265,557 less than what would be required to discharge the company's present liabilities and that there remains a further liability to policyholders of about £600,000 in respect of their accrued claims. In these circumstances, it was submitted, there would be no answer to a winding-up petition presented at the suit of one of these unpaid creditors; there would be a manifest inability to pay 'debts absolutely due,' within the judgment of Sir William James VC in *Re European Life Assurance Society* LR 9 Eq 122.
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> I would probably have acceded to this submission, if it had been put forward by one such creditor, who had made a request for payment, which had not been complied with within a reasonable time, even though such a request did not amount to a demand falling within section 223(a) of the Act of 1948. Neglect in payment of a sum as to which a statutory notice has been given is only one of several ways of showing inability to pay debts, which may be shown in any other way: see *Re Globe New Patent Iron & Steel Co* (1875) LR 20 Eq 337 and *Re Flagstaff Silver Mining Co of Utah* (1875) LR 20 Eq 268. A failure by the company to pay an admitted creditor within a reasonable time after demand would be likely to provide ample evidence of such inability. I cannot, however, accept that mere evidence that a company, such as the company in this present case, has for the time being insufficient liquid assets to pay all its presently owing debts, whether or not repayment of such debts has been demanded, by itself proves inability on its part to pay its debts, within the meaning of ss 222 and 223 of the Act of 1948 or s 50 of the Act of 1974. The company, for all I know, may have other assets which would or could readily be realized in a few days and would suffice for the discharge of all its immediate accrued liabilities. It may, for all I know, have other assets which, while they would take longer to realize, would at present values suffice for the discharge of all its contingent and prospective liabilities. It is significant that at the date of presentation of the petition, the company did have liquid assets amply sufficient to meet all its accrued liabilities.

In support of his argument that the quick assets test is the test for insolvency, Mr Darvall referred to a passage on p 26 of Picarda on the *Law Relating to Receivers and Managers*. The passage deals with debenture holders, and states (without identifying the section to which it refers):

> It is not necessary to say that the word 'solvent' in the section is limited to one meaning. In some contexts the word 'solvent' is given a liberal interpretation and treated as encompassing the situation where total assets exceed total liabilities. According to this test, sometimes (perhaps misleadingly) called the 'commercial solvency' test, a company the value of whose total assets, including items of property not capable of being realized quickly, exceeds its total liabilities is solvent. The argument that if upon balance sheet figures a company's assets exceed its liabilities the company is solvent was rejected by Maugham J in *Re Patrick & Lyon Ltd.* He pointed out that the word 'solvent' in this context appears in a section which follows immediately after a section dealing with fraudulent preference and in construing it the court has to bear in mind the bankruptcy provisions where preference is defined in relation to a thing done or suffered by a person 'unable to pay his debts as they become due from his own money'. In his view a company was not

solvent unless it could pay its debts as they became due. *Yet even that is not a sufficient yardstick. The debts must be paid from the company's own money. A company is not necessarily solvent on a particular day if it is, on that day in a position to meet any demand lawfully made by a creditor, if it can do so only by borrowing from someone else.* One commentator has suggested that while the payment of debts out of the company's own income is clearly acceptable 'the courts have adopted an unnecessarily liberal view when holding that payment of debts out of easily realizable capital is also permissible'. (emphasis mine)

Reliance was also placed on *Sandell* v *Porter & Anor*,[4] a case which concerned s 95 of the Bankruptcy Act 1924-1960 of Australia, by which insolvency is defined as an inability to pay debts as they fall due out of the debtor's own money. Barwick CJ said, at pp 670-671:

An essential step in making out that a payment is a preference within s 95 is to establish by evidence to the satisfaction of the court that the payer was at the time of the payment insolvent. Insolvency is expressed in s 95 as an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time – relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilizing such cash resources as he has or can command through the use of his assets to meet his debts as they fall due which indicates insolvency. Whether that state of his affairs has arrived is a question for the court and not one as to which expert evidence may be given in terms though no doubt experts may speak as to the likelihood of any of the debtor's assets or capacities yielding ready cash in sufficient time to meet the debts as they fall due.

Counsel for the petitioner also cited *Re Timbatec Pty Ltd & Companies Act*[5] in which Bowen CJ, who saw *Sandell's* case[4] as supporting the proposition, held that the test of insolvency requires consideration of the amounts a debtor might readily be in a position to raise, in addition to cash resources, by sale or mortgage, while continuing his business.

In the course of his judgment Bowen CJ said, at p 18:

One of the difficulties of realizing assets is that it may involve the company in terminating that particular part of its business and may even, in some circumstances, involve it in breach of contract. The same applies to the sale of stock, which is on hand to be devoted to the performance of works in progress. It may be possible to realize cash from selling it, but this may involve throwing away the contracts or works in progress, and in some circumstances may involve liability for damages for breach of contract. The same applies to office furniture and equipment. This may be sold to realize cash. But it is difficult to visualize a continuing business without tables and chairs on which to conduct its administrative side. In other words, the test as regards ready realization of cash resources has regard, as I understand it, to the debtor who is conducting a business, and is applying his cash resources, and selling or mortgaging assets readily available to inflate these resources, while continuing his business. I do not take it to apply to a situation where the business is brought to a full stop, and either sale or mortgage can produce cash resources if it breaks up its business. This is implicit in Barwick CJ's reference to 'temporary lack of liquidity'. He is not referring to a terminal lack of liquidity.

Another case to which I was referred, and which was said to support the quick assets test as a test for insolvency, was *Expo International Pty Ltd* v *Chant & Ors*,[6] in which Needham J, stated at p 836:

'Solvent' in s 294 does not mean, in my opinion, merely an absence of creditors knocking at the door. A company is not necessarily solvent on a particular day if it was, on that day, in a position to meet any demand lawfully made by a creditor. It may be necessary to investigate the sources from which such payments might be made. If, for example, the company could pay one debt only by borrowing from someone else, its solvency could come into question: cf *Re Australian Cooperative Development Society Ltd.* It is clear that a lack of liquidity is not equivalent to insolvency; I think the converse is also true, namely, that the fact that a company has liquid assets is not conclusive of its solvency.

At p 837 the learned judge said:

This conclusion is, I think supported by the judgments in *Rees* v *Bank of New South Wales*. This case, again, related to a claim under provisions similar to s 293. Barwick CJ, said: 'It is quite true that a trader, to remain solvent, does not need to have ready cash by him to cover his commitments as they fall for payment, and that in determining whether he can pay his debts as they become due regard must be had to his realizable assets. The extent to which their existence will prevent conclusion of insolvency will depend on a number of surrounding circumstances, one of which must be the nature of the assets and in the case of a trader, the nature of his business. Here the company's business was the sale of foodstuffs through a number of retail outlets. The asset whose value was said to negative a conclusion of insolvency, or at any rate to obviate the suspicion of it, was its trading stock of foodstuffs. In the ordinary course of the company's business this asset was not available to be realized except by means of retail sales through its various shops. It is possible, of course, in a business such as that of the company for excess stocks to be realized otherwise than through the channels of the company's retail business: but, although there had been an abortive negotiation for a total takeover of the company's business, no proposal to realize surplus stock by some bulk disposal for cash was in contemplation. The bank was not contemplating that the company intended to liquidate its business but to carry it on. Indeed the bank with a degree of sympathy was assisting the company to carry on the business. The stock in trade was clearly not an asset which was to be realized to meet current debts except in the ordinary course of the company's business, a course which had proved itself inadequate.

Upon a first reading, the authorities cited by Mr Darvall appeared to provide him with support, but he was obliged to concede that none of them was concerned with a test for putting a company into liquidation, and that they all related to questions of preference or to the setting

aside of a debenture when a company was already in liquidation, or to analogous situations. The sections which were considered in the cases cited by Mr Darvall are differently worded from winding-up sections. In *Sandell*[4] and the *Expo* case,[6] the court was concerned with the meaning of the inability of a debtor 'to pay his debts as they became due from his own money'; and while, in the *Expo* case,[6] Needham J considered the meaning of 'solvent' for the purposes of s 294 of the Australian Companies Act, and concluded that a company is not necessarily solvent if it can 'pay one debt only by borrowing from someone else', at no stage was the provision of a winding-up section being considered.

It is clear, too, that the word 'debts' in what were referred to as the 'non-winding up sections' have a wider meaning than in winding-up sections. The distinction between the wider type of debt, and debts which support a petition in insolvency, was recognized by Isaacs J at pp 1545-6; 1547-8 and 1555, in the course of his judgment in *Bank of Australasia* v *Thomas Murray Hall.*[7] A clear distinction is made by the learned judge between a debt which is capable of founding a petition, and the wider category of debts which are provable in a winding up. The High Court of Australia in *Hymix Concrete Pty Ltd* v *Garrity*,[8] another case which was concerned with a non-winding up section and dealt with the administration of a company already in liquidation, held that the words 'unable to pay its debts due from its own money' should be read in the light of the judgment in *Bank of Australasia* v *Thomas Murray Hall*,[7] and that words in later cases, including *Sandell*,[4] which appeared to be more favourable to a creditor, should be treated as applications of an established principle to particular facts, and not as enunciations of a principle.

The result, in my judgment, is that the authorities cited by Mr Darvall do not support the quick assets test as the test for insolvency under s 254(2)(c) of the Companies Act of Singapore. Indeed, it was demonstrated to me by Mr Lyndon-Stanford that, were the quick assets test to be the test for insolvency, some 20 companies listed on the Stock Exchange of Singapore would be insolvent on the basis of their last published accounts, because each has a deficiency on current assets. Section 254(2)(c) stipulates that in determining whether a company is unable to pay its debt the court is to take into account contingent and prospective liabilities. There is nothing in the subsection which requires that the company should have the capacity to meet these liabilities out of its own moneys and I see no basis for applying this gloss.

The two tests, the one practical and the other theoretical, to which I earlier referred are, in my judgment, the true tests for insolvency. Has the company failed to meet a current demand for a debt already due? – the practical test – or, on a balancing overall of liabilities against assets, is there a deficit? – the theoretical test. The Company passes both these tests, and there is no basis in law for saying that it is insolvent because it would not be in a position to pay its debts out of current assets if OCBC were to call in the overdraft. The reality is that OCBC has not demanded payment, and the debt is not due. The Company cannot, in my judgment, be said to be insolvent, and accordingly I declined to make a winding-up order on that ground. The only basis upon which it was suggested that it is just and equitable that the Company be wound up was that the Company 'will not be able to pay its debt'. I was not prepared to make a winding-up order on that ground either, having concluded that the Company is not insolvent. I would observe that the petition was not supported by any other contributory. It seems at long last, as though things may be looking up for the Company.

I was invited by Mr Darvall, in the event that I was not prepared to make a winding-up order simpliciter, to consider as an alternative an order under s 216(2)(d) by which the winding-up order would not take effect for a period of, say, two weeks, the order to be permanently stayed or withdrawn if the petitioner's shares in the Company were purchased on or before the expiry of that period. I declined to make such an order because, on a plain reading of s 216(2), I was empowered to do so only if I was of the opinion that a case of oppression under s 216(1)(a) was made out. I was not of such opinion, and accordingly an order in any form for the purchase of the petitioner's shares did not arise for consideration.

Petition dismissed.

Solicitors: *Lee & Lee*; *Tan Rajah & Cheah.*

Reported by *PS Ranjan*

Lee Kuan Yew v Seow Khee Leng

HIGH COURT (SINGAPORE) – SUIT 9332/84
CHUA J
30 SEPTEMBER 1988

Tort – Slander – Assessment of damages – Aggravated damages – Factors taken into account in assessment

The plaintiff was at all material times the Prime Minister of Singapore. The defendant was at the material time a businessman and the secretary general of the Singapore United Front ('SUF'), a registered political party, and in the 1984 general elections was a candidate of his party. Polling day was 22 December 1984. The plaintiff alleged that on 15 December 1984, at a political rally, the defendant had falsely and maliciously spoken and published of and concerning the plaintiff in